STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 07 EDC 1389
Student, by and through his Parent, *Parent*, Petitioners, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Respondent.	**DECISION**

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on November 12, 13, and 16, 2007 in Charlotte, North Carolina.

APPEARANCES

For Petitioners: Brett A. Loftis
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PRILIMINARY MATTERS

1. Prior to the hearing in this matter, the Respondent made a motion to dismiss for lack of jurisdiction based upon its assertion that parentally-placed (private school) students do not have an individualized right to special education services and do not have the right to file a contested case/due process petition. That motion also sought to dismiss claims not based on the Individuals with Disabilities Education Act (IDEA), such as those involving Section 504 of the Rehabilitation Act of 1973. The Undersigned dismissed those non-IDEA claims at the hearing. Respondent also made a motion to dismiss at the conclusion of the Petitioner's case. As Respondent asserted Petitioner's failure to state a claim upon which relief can be granted and as matters outside the pleading had been presented to the Undersigned and not excluded, the

Undersigned treated Respondent's motion as one for summary judgment, Petitioner having been given reasonable opportunity to present all pertinent material.

2. The Respondent asserted that *Student* was a parentally-placed (private school) student at the time of the September 2006 IEP meeting as CMS contends. As such Respondent asserts that federal and State law state that parentally-placed (private school) students do not have due process rights on issues relating to the provision of services. Respondent sets forth the regulations which cite that disputes that arise about equitable services are properly subject to the State complaint procedures in 34 CFR §§ 300.151 through 300.153.

3. Respondent cites the following: "The standard remedies for resolving disputes between parents and school districts regarding the provision of special education services is the due process hearing, with review by federal courts. However, the 2004 amendments to IDEA expressly deny these remedies to parents of students in (private school)s, except as to challenge a school district's failure to properly satisfy the child find requirements of identifying, locating, or evaluating the student. For all other complaints, each state educational agency (SEA, *e.g.*, department of education) must establish a separate complaint process for the SEA to resolve any complaint regarding denial of appropriate services." R. Mawdsley & A. Osborne, "Providing Special Education Services to Students in Religious Schools," 219 Ed. Law Rep. 347, 364 (2007).

4. Petitioner asserted she sent *Student* back to a private parochial school because CMS had not developed an IEP at the time school started on August 25, 2006. Admittedly, *Student* wanted to return to his friends and *Parent* was concerned for *Student*'s emotional well being. However, *Parent* testified that she always intended to have *Student* go to a CMS school. She demonstrated this intent by initiating contact with CMS two weeks after the shooting, by enrolling *Student* at B Elementary School, by fully and cooperatively participating in all requirements that CMS presented, and by ensuring the services she acquired at (private school) would only be temporary until he began attending CMS.

5. The existence of personal jurisdiction is a question of fact for the trial court. The party asserting jurisdiction (the Petitioner) need only make a *prima facie* showing that jurisdiction exists, and mere allegations of in personam jurisdiction are sufficient for a party to make a *prima facie* showing. All conflicts in fact must be resolved in favor of the plaintiff for purpose of determining whether a *prima facie* showing of personal jurisdiction has been made. *Combs v. Bakker,* 886 F.2d 673 (4th Cir.1989); *Dowless v. Warren-Rupp Houdailles, Inc.,* 800 F.2d 1305, (4th Cir.1986).

6. When reviewing a motion to dismiss, the court assumes the facts alleged in the complaint (Petition) are true, *see McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996), and construes the allegations in the light most favorable to the pleader (in this instance the Petitioner). *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

7. A court should dismiss an action for want of subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir.1999) (quoting *Richmond,*

Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir.1991)). In ruling on a motion to dismiss for lack of jurisdiction, the court may consider materials beyond the bare pleadings. *Evans,* 166 F.3d at 647

8. Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. *See Lee v. Shor*, 10 N.C.App. 231, 233, 178 S.E.2d 101, 103 (1970). To entitle one to summary judgment, the movant must conclusively establish a legal bar to the nonmovant's claim or complete defense to that claim. *See Virginia Elec. and Power Co. v. Tillett,* 80 N.C.App. 383, 385, 343 S.E.2d 188, 190-91, *cert denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). The burden of establishing a lack of any triable issue resides with the movant. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.* 313 N.C. 488, 329 S.E.2d 350 (1985). The trial court must determine if there is a triable material issue of fact, viewing all evidence presented in the light most favorable to the nonmoving party. *See Waddle v. Sparks*, 100 N.C. App. 129, 394 S.E.2d 683, (1990), *aff'd in part and rev'd in part on other grounds*, 331 N.C. 73, 414 S.E.2d 22 (1992). The slightest doubt as to the (material) facts entitles the nonmovant to a trial. *See Snipes v. Jackson*, 69 N.C.App.64, 316 S.E.2d 657, *disc.review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984). Facts asserted by the party answering a summary judgment motion must be accepted as true. *See Norfolk & Western Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E.2d 734 (1974). Further, summary judgment may not be used where conflicting evidence is involved. *See Smith v. Currie*, 40 N.C.App. 739, 253 S.E.2d 645, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979). Moreover, if there is a question which can be resolved only by the weight of the evidence, summary judgment must be denied. *See City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980).

9. Petitioner's actions when applied to the applicable standards of review lead to no other conclusion but that Respondent's Motions were denied. The Undersigned found that the Office of Administrative Hearings had jurisdiction of this contested case and jurisdiction over the Petitioner and Respondent.

ISSUES IN THIS DECISION

Whether the individualized education program (IEP) developed on September 20, 2006 for *Student* was appropriate.

Whether *Student* was denied a free appropriate public education and the Petitioner is entitled to reimbursement for private tuition and other services for the 2006-07 school year.

Whether *Student* was entitled to any further relief or remedy as required under IDEA.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at this hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making these findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of

the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witnesses, any interest, bias or prejudice the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner, *Student*, was born Month day, 1998. He was parentally placed at (a private parochial school) upon the start of first grade in August 2004. On June **, 2006 *Student* was shot in the head by his father as he was sleeping in his home. His father also shot and killed *Student*'s (sibling) and himself. As a result of the shooting, *Student* was rendered totally and permanently blind.

2. Until June 2006, *Student* lived with his mother, father, and older brother in ** County. *Student* and hissibling attended a private parochial elementary school in North Carolina. He finished second grade at (private school) in June 2006.

3. *Student* was in the hospital for approximately three weeks following the June shooting, including rehabilitation time. On June **, 2006, 15 days after the shooting, *Student* was tested by A.P., who identified herself in her report as a "Cognitive Educational Specialist" for the ** Institute of Rehabilitation. A.P.'s report is titled "Cognitive Education Evaluation and Discharge Summary." (Resp. Ex. 1).

4. Under "Reason for Referral:" the report states: "*Student* was referred for Cognitive Education evaluation for school services facilitation and to determine techniques and strategies for (private school) to use in conjunction with community resources for the blind." (Resp. Ex. 1). Under "Background," the report states: "His mother stated that she wanted him to remain at the parochial school as it would be the only constant in his young life." (Resp. Ex. 1).

5. A.P. administered portions of the Woodcock-Johnson-III achievement test. In every broad scale score, *Student* scored well above grade level. With a scaled score of 100 being average, *Student*'s broad scale scores ranged from 106-114. His grade equivalents ranged from 3.4 (third grade, fourth month) to 3.8 (third grade, eighth month). At the time of this test, *Student* had just completed second grade. (Resp. Ex. 1).

6. The report notes that *Student* "explained with visible pride and enjoyment the strategies he used to solve the [math] problems in his head." It goes on to state, "After just one hearing, *Student* was able to keep the information in his head, make a mental image of the problem and solve it at more than one year above grade level." (Resp. Ex. 1). A.P. concluded that *Student*'s "high achievement ability will give him the freedom to learn new techniques and strategies for learning and performing in school. He is scheduled to begin to learn to read Braille this summer, and should do well with this." (Resp. Ex. 1).

7. K.D., a Charlotte-Mecklenburg Schools (CMS) Student Service Specialist at B Elementary, was tendered and accepted as an expert in school psychology. She testified that this test showed that *Student* was performing very well educationally after the shooting.

8. K.D., a school psychologist, agreed with the conclusion from A.P.'s report. According to K.D., *Student*'s "high achievement ability a few weeks after his accident indicated that he still is performing at an average to above average level; that that meant he had strong foundation skills that would prove him well when moving forward in his education." (T. 16Nov07 at 75).

9. According to K.D., if *Student* had been suffering from emotional distress sufficient to call into question the validity of the testing results, the author of the report (in this instance, A.P.) would have had a duty to report it.

10. A.P.'s Cognitive Education Evaluation and Discharge Summary does not mention any issue with emotional problems interfering with her testing or *Student*'s future ability to be successful in the classroom.

11. By June **, 2006, *Student* was eating a regular diet, according to A.P.'s report. (Resp. Ex. 1).

12. Upon discharge from the hospital on July **, 2006 *Student* and his mother, moved into the home of his mother's parents, located at _____, Charlotte NC ___. This address is within the attendance zone for B Elementary School of the Charlotte Mecklenburg Schools system.

13. Respondent, Charlotte-Mecklenburg Board of Education (CMBE or CMS) is a local educational agency receiving monies pursuant to IDEA and would have been the local educational authority responsible for developing an IEP for *Student* once he moved to Mecklenburg County and began attending a CMS school.

14. Contact with Charlotte-Mecklenburg Schools regarding *Student* was made on June 26, 2006 when Grandmother contacted N.W., an Exceptional Children's Program Specialist with CMS.

15. A meeting was held at (private school) on July 12, 2006 with representatives from (private school) and CMS, as well as *Parent* and Grandmother, to discuss public education services for *Student*. The purpose of that meeting, according to *Parent*, "was to get everybody together from the (private school), the public school and determine what is the best route" for her son. (T. 12Nov07 at 82). *Parent* testified that at that point she was traumatized, too, and, "wasn't even thinking *Student* was going back to school." *Parent* did state that she believed that "the most appropriate place, based on his psyche, that it would be (private school)." *Parent* recalled that N.W. stated at the meeting that possibly something could be worked out "where he can be dually enrolled." (T. 12Nov07 at 83).

16. N.W., a CMS special education administrator, attended that meeting. She recalled that a number of different potential scenarios for serving *Student* were discussed, including one where he would stay at (private school) and get some services from CMS.

17. She explained that Elementary School E was CMS's visually impaired (VI) elementary resource room location. At the meeting, N.W. specifically "reaffirmed Charlotte-Mecklenburg's decision that, under our 6B project, we don't serve any (private school) students with VI services." (T. 16Nov07 at 240).

18. At the meeting, N.W. told *Parent* that in order for *Student* to receive services, he would have to enroll in Charlotte-Mecklenburg Schools, and N.W. informed *Parent* that *Student* would need to be enrolled in CMS and have an Individualized Education Program (IEP) developed before specific services could be arranged. N.W. told *Parent* about the process of how to enroll in the public school system, and explained that *Student* would have to register with the school system if *Parent* wanted CMS to evaluate him and to develop an IEP for him.

19. On cross-examination, *Parent* confirmed that, at the July 12th meeting, she made it clear that *Student* was returning to (private school). She also posted this information on her web log. *Parent* stated that she never said in her web blog that *Student* was going to B Elementary School because it was "never placed before me as an option." (T. 13Nov.07 at 122). *Parent* believed, "through my conversation with N.W. in July that we were working out some sort of program where he could go to a local school on either east – what was Endhaven or Hawk Ridge, someplace close where I'd be able to transport him." (T. 12Nov.07 at 147). *Parent* believed CMS was looking "to dually enroll him and that, I didn't even know existed until N.W. suggested it to me at the meeting in July." (T. 12Nov.07 at 147).

20. K.O., the principal of (private school), attended the July 12th meeting. He characterized the purpose of that meeting as a brainstorming meeting on how to best serve *Student* at (private school). As he put it, "If this is what *Parent* wanted to do it, is have her son at (private school), we were going to make it work." (T. 13Nov.07 at 8-9). He recalled that the team "talked about that Elementary School E was the one school that he could attend if he wanted to go to CMS." (T. 13Nov07 at 6). K.O. could not remember any discussion of emotional or mental health issues at the July 12th meeting.

21. (The student's grandmother), kept notes of the July 12th meeting. (Grandmother), who had the notes in front of her when she testified, testified that they contained no specific or any general mention of emotional trauma or the state of *Student*'s mental health. She did state that "it was always on the table that *Student* had suffered a tremendous trauma." (T. 12Nov07 at 207). She stated that no conclusions on placement were reached. She did recall having a phone conversation with N.W. about a homebound program prior to the meeting, as at that point, no one knew if *Student* would be able to attend school full time. It was her understanding that CMS would provide a homebound program.

22. As a result of the meeting and at the direction of N.W., *Student* was enrolled in B Elementary by his (Grandfather), at the end of July, 2006.

23. On July 31, 2006, *Parent* met with Dr. J.R., the Assistant Superintendent for Exceptional Children's Services with CMS. At that meeting, *Parent* made her intention known to keep *Student* at (private school). Writing in her web blog just before this due process hearing in November 2007, *Parent* said that she had been consistent all along that *Student* would remain at (private school) and had so informed Dr. J.R. in a meeting in late July 2006. *Parent* told Dr. J.R. that "he was physically going back to (private school)for his emotional well being," but went on to say, "but we're talking about services, we're talking about mobility and visually-impaired services. That's a whole different situation." (T. 12Nov07 at 148). *Parent* testified that she went to Dr. J.R. based on conversations with N.W.. "It was my impression the whole entire time that we were going to work something out with CMS as far as visual-impairment services and,

hopefully, a transition plan to transition this child, who's in a traumatic state, gradually transition him into the public school where surely there was better services where (private school)had none." (T. 12Nov07 at 148).

24. *Student* began intensive individual therapy with Dr. D.S. on August 1, 2006. Dr. D.S. is a psychologist who works primarily with children in the area of behavioral pediatrics and anxiety disorders. She was accepted as an expert in the field of behavioral pediatrics, child psychology.

25. Dr. D.S. had several concerns during her first session with *Student.* They included the fact that *Student* had no sense of light and his circadian rhythm was out of control causing him to sleep and wake at unusual hours. She also found that he was afraid to be alone and very dependent on his mother. It took several sessions before he could be alone in Dr. D.S.'s office without his mother. She also assisted and "gradually got him to the point where he could sleep," as well as "worked on spending more time in his own home independently in a different room from where his mom is." (T. 13Nov07 at 24-25.)

26. Dr. D.S. stated that as *Student* had lost his sibling, his father, his intact family and his house, it made sense that he would want to go back to (private school) where he had a visual memory of the school and where he felt comfortable around the children that he knew. *Student* described (private school) as his home to Dr. D.S. Dr. D.S. testified that *Student* had a diagnosis of posttraumatic stress disorder.

27. On August 4, 2006 an Initial Referral meeting was held at B Elementary School to complete an Exceptional Children's Referral. *Parent* and her mother attended. *Parent* was instructed to list why *Student* was "being referred for an IEP meeting." (T. 12Nov07 at 86.).

28. The purpose of the Exceptional Children's Referral is to catalog the student's strengths and the concerns that are driving the referral. On *Student*'s referral, *Parent* and (Grandmother) made no mention of concerns over emotional trauma or other emotional issues. The only referral concern noted was *Student*'s blindness. (Pet. Ex. 3). She believed that "all I needed to fill out was why we were requesting a referral for this." (T. 12Nov07 at 87.).

29. K.D. has worked with school children who suffer from post-traumatic stress disorder (PTSD). If the referral had shown PTSD, she would have been on the lookout for concerns on the referral such as poor self-concept, fearful, poor social skills, abandons difficult tasks, excessive daydreaming, talks about morbid themes, temper tantrums, depressed or withdrawn, and consistent inappropriate emotional responses. None of these concerns were checked on the referral. (Pet. Ex. 3).

30. In addition to filing out the Referral Form, *Parent* discussed *Student*'s emotional needs at the August 4, 2006 meeting, including his sleep issues, eczema, diarrhea, and fear of being alone at night or going to the bathroom alone.

31. At the start of the 2006/2007 school year the Exceptional Children Referral was still being processed and no services were being offered by CMS. *Student* began the 2006-07 school year at (private school), where he had attended his entire school career to that point. *Parent* testified that a big concern was *Student* wanting to go back to school and "he wanted to go because

he wanted to see his friends." (T. 12Nov07 at 88). The CMS school term began August 25, 2006. On August 23, 2006 *Student* began at (private school). On September 20, almost 4 weeks after CMS classes began, the parties convened the IEP meeting.

32. On November 1, 2007, *Parent* wrote in her web blog of her decision to leave Charlotte. In that entry, she recounted her dispute with CMS. In that entry, she wrote that, early on, "it was made very clear that *Student* would return to (private school), the school he had attended for the previous two years." (T. 12Nov07 at 130).

33. When asked specifically if he noted any changes in *Student* at the start of the 2006-07 school year, K.O. testified: "I think he was very excited to come back and his classmates were very excited to see him at least that was from my observation. He impresses me – impressed me, and still today, his eagerness to learn, his willingness to try new things, his braveness, and taking on the new challenge he has in his life." (T. 13Nov07 at 10).

34. *Parent* privately hired a Teacher of the Visually Impaired (hereafter "TVI") for *Student* at the cost of $45 per hour, plus mileage. (Pet. Ex. 12). *Parent* ensured that the TVI services could be terminated as soon as *Student* began receiving services through CMS.

35. (Private school) provided *Student* with a one-on-one aide, as well as space for his visual impairment instructor. They also provided individual counseling to address his emotional needs upon returning to school.

36. On August 31, 2006, *Parent* reported on her web blog that she had visited Elementary School E. She could not remember herself the exact date of the visit but agreed that it took place prior to September 1st. At that visit, she told D.G. that she wanted to keep *Student* at (private school).

37. CMS evaluated *Student* on September 1, 2006 for adaptive physical education, orientation and mobility, and visual impairment. These evaluations took place at (private school).

38. On September 1, 2006, M.S., H.C. and D.G. evaluated *Student* at (private school). K.M. warned M.S. that *Student* might be afraid of strangers, but *Student* exhibited no fear when meeting and working with the three CMS educators. *Student* was "very courteous, very sweet, wanting to show us Braille that he learned; wanting to talk about how he could move around the building; wanting to talk about his classroom, things like that." (T. 16Nov07 at 21). M.S. and the others spent about an hour and a half with *Student* and went throughout the school environment at (private school).

39. M.S. was tendered and accepted as an expert in the area of adaptive physical education as it relates to special education students. She has a Master's degree in special education. She has worked with special education students on a full time basis since 1975. M.S. performed an adaptive physical education evaluation on *Student*.

40. Prior to her evaluation of *Student*, M.S. reviewed the Exceptional Children's Referral completed by *Parent* on August 4, 2006. (Pet. Ex. 3). That document told her that *Student* had considerable strengths and was coping well. She witnessed many of these strengths and coping skills when she evaluated *Student* on September 1, 2006. M.S. also reviewed A.P.'s

evaluation (Resp. Ex. 1) prior to meeting *Student*. In M.S.'s experience, *Student* showed the same kind of "visible pride" and "enjoyment" that A.P.'s "Cognitive Evaluation" from July documented. (T. 16Nov07 at 12-13).

41. M.S. concluded, based on her evaluation and interactions with *Student* that he was coping well and was interested in moving on with his education. (Resp. Ex. 9).

42. M.S., who was present when Dr. D.S. testified, stated that *Student* did not appear to have any of the difficulties at school that Dr. D.S. stated he was having at home. M.S. characterized *Student* as "a delightful young man who appeared to be moving in a forward direction, demonstrating some coping skills, able to participate with his peers in a general physical education setting with adaptations." (T. 16Nov07 at 28-29).

43. In her handwritten notes accompanying her test protocol on September 1, 2006, M.S. noted "Neat kid. Appears very comfy with meeting us. Very cooperative. Fun sense of humor." (Resp. Ex. 10). Given *Student*'s records that she had reviewed and her interaction with *Student* during the evaluation, M.S. believed that *Student* "could be successful in a public education building." (T. 16Nov07 at 32).

44. H.C. was tendered and accepted as an expert in the teaching of the visually impaired. Prior to her retirement in June 2007, H.C. worked for CMS for many years as a teacher of the visually impaired.

45. On September 1, 2006, H.C. conducted a Braille Skills Inventory with *Student* at (private school). (Resp. Ex. 12). Prior to meeting *Student*, she reviewed the available records relating to him. *Student* was further along in his Braille skills than she had expected, given that it was less than three months after the shooting. According to H.C., this told her "that he had a willingness to learn Braille and that he was a quick learner." (T. 16Nov07 at 161).

46. H.C. had the opportunity to watch *Student* interact with M.S. and D.G.. She noted no hesitation on his part, and he remained in a good mood throughout the time they spent with him.

47. D.G., who had 27 years experience in the orientation and mobility field, also went to (private school) to evaluate *Student*. *Student* had been working on mobility with Bob Hughes, a volunteer from *Parent*'s church. Mr. Hughes told D.G. that *Student* was doing very well and was adapting and adjusting.

48. During her evaluation on September 1, 2006, D.G. asked *Student* to show her around the school. He was able to use a long cane to orient himself and move around the campus. D.G. testified: "You know, that, in that short period of time, his skills – he's acquired very good skills. Which tells you that, cognitively, which we know from the record, I mean, that he has a lot going for him. And I didn't see any issue with him being in a newer situation." (T. 16 Nov 07 at 191).

49. There were no emotional or psychological evaluations conducted on *Student* by CMS.

50. An IEP meeting was held at B Elementary School on September 20, 2006. *Student* was found eligible for special education services under the classification of visual impairment. (Pet. Ex. 1.) The IEP, including the goals and objectives, was drafted by CMS prior to the start of the meeting and a copy of the draft IEP had not been provided to the family. Additionally, the DEC 5, which is a summary document of the meeting, indicating what services have been considered and what services have been determined, had also been drafted by CMS prior to the IEP meeting. Both *Parent* and CMS were represented by counsel at that meeting. *Parent* testified that Brett Loftis, an attorney, was there to look after her interests in the IEP meeting.

51. As part of the eligibility process, CMS developed and presented a *Summary of Evaluation Results and Eligibility Determination.* That document, signed by *Parent*, summarized *Student*'s strengths as follows: "*Student* is cooperative, eager to learn, good sense of humor, has good foundational gross motor skills, enjoys physical activity. [R] has good tactual awareness skills and is enthusiastic about learning Braille. *Student* has good mental math skills." (Pet. Ex. 1).

52. For the Needs Summary, the team noted: "*Student* should continue to refine cane skills and expand orientation skills and will need to learn strategies to participate in activities. *Student* needs intense Braille instruction." (Pet. Ex. 1).

53. *Parent* signed the *Summary* in the presence of her counsel and did not ask for or include any information regarding his emotional status. (Pet. Ex. 1).

54. M.S., who was part of the IEP team, testified that the summary of strengths on Petitioner's Exhibit 1 was an appropriate and accurate description of *Student*'s strengths based upon her experience with *Student*. She also testified that the needs summary accurately reflected what *Student* needed.

55. H.C. explained the results of her Braille Skills Inventory and her interaction with *Student*.

56. K.D. testified that at the IEP meeting, as her colleagues discussed the results of their evaluations and interactions with *Student*, she believed the strengths that were being discussed showed that *Student* could do well in an educational setting where he would be meeting new people.

57. At the IEP meeting, which was not recorded, *Parent* and the staff from (private school) maintained that *Student* should remain at (private school) because he was familiar with the school (having gone there two years as a sighted child) and because he would be more comfortable with his friends around him.

58. There was conflicting evidence in the testimony as to whether the term "post-traumatic stress disorder" was discussed at the meeting. *Parent* insisted that it was. The CMS staff who testified insisted that it was not. The *Prior Written Notice* from the meeting documents that information from a phone conversation with Dr. D.S. was considered but does not detail what the information was.

59. Dr. D.S., *Student*'s private psychologist, contacted N.W. to discuss her concerns regarding *Student*'s emotional and psychological needs the day before the IEP meeting. Dr. D.S. could not attend the meeting and N.W. assured her that she would relay her comments to the team.

60. Dr. D.S. shared that she was very concerned about *Student* and that what he had experienced was causing him to be fearful, to be uncomfortable with strange adults and to be uncomfortable and fearful in unfamiliar situations or new situations.

61. Dr. D.S. felt it would be in *Student*'s best interest to remain at (private school), where his friends were, where he had a continuity of familiar voices and had established a relationship with the adults there, and where he had a visual memory of the campus.

62. N.W. confirmed that Dr. D.S. told her of her concern regarding *Student*'s emotional needs and particularly that his "lack of trust for adults, including *Parent*" would have an impact on the way he would be able to access the education environment. (T. 16Nov07 at 267).

63. Dr. D.S. testified that she informed N.W. of *Student*'s diagnosis of Post Traumatic Stress Disorder and they discussed his symptoms and treatment extensively. N.W. testified that Dr. D.S. never used that term with her in their telephone conversation.

64. At the September 20, 2006 IEP meeting, N.W. relayed her conversation with Dr. D.S. to the IEP team, basically stating that Dr. D.S. did not agree with placing *Student* anywhere other than where he was familiar.

65. K.D. recalled that N.W. relayed three points from the conversation with Dr. D.S. which included keeping "*Student* at his current school, that he had friends there, that he had a mental image or mental map of the school." (T. 16Nov07 at 83-84). When N.W. finished her report of her conversation with Dr. D.S., K.D. recalled that no mention was ever made of post-traumatic stress disorder.

66. K.D. testified that the only information from the (private school) staff at the IEP meeting on the issue of *Student*'s emotional state was that he felt safe and comfortable at that school. They offered no specific information as to how they believed the trauma that he had gone through was negatively impacting his educational performance.

67. *Parent* nor her attorney asked for any written notation that post-traumatic stress disorder be noted as an issue in the documents generated at the September 20, 2006 IEP meeting. Further, neither *Parent* nor anyone on her behalf presented any written documentation discussing *Student*'s mental health status or needs. Petitioner did not introduce any report from Dr. D.S. into evidence, and no written report from her was shared with the IEP team on September 20, 2006. Dr. D.S. testified that *Parent* did not ask her to prepare a written report for use by the IEP team.

68. CMS staff discussed in the IEP meeting their interactions with *Student* during their evaluations and how he was eager to please them, had no problem interacting with new adults, and was proud of how he was able to perform educationally despite his new blindness.

69. The IEP that was developed at that meeting was dated September 20, 2006 and had an end date of January 31, 2007. CMS witnesses testified that the IEP was designed to be a

transitional IEP, and they used a short time-frame so that the IEP team could reassess the IEP after *Student* had attended public school.

70. The September 20, 2006 IEP has goals in the following areas: acquisition of Braille skills; using Braille to complete written assignments; using Braille to complete math problems; orientation and mobility skills in the school and community; and adaptive physical education; increasing self-advocacy to ask for adult assistance when *Student* feels emotionally uncomfortable. (Pet. Ex. 1).

71. CMS staff testified that the goals and objectives of the September IEP were appropriate for *Student* based upon their interactions with him during their evaluations; existing records; and information provided by *Parent* and others. No witness testifying on behalf of *Parent* challenged or disagreed with any of the goals and objectives of the September IEP. *Parent* indicated that the level of services were fine; she just wanted CMS to implement them at (private school).

72. With regard to the self-advocacy goal in the September IEP, Dr. D.S. testified that she agreed with the description of *Student* in the Present Level of Educational Performance. She thought it accurately described *Student*'s situation at that time. Dr. D.S. testified that such a goal should be graduated. She explained that this meant one would have to take a step-by-step process with *Student*.

73. Dr. D.S. agreed that it was important for *Student* to begin working on any fear that he had in dealing with new people or situations; that it was important for him to learn to take on self-awareness of his anxiety; that it was important for him to recognize that he may feel more stress and anxiety in new situations and that he needed to ask for help in those situations. She agreed that an appropriate strategy to tackle those issues would be "to work with him using somebody that he has more familiarity with as he is introduced to either a new person or new situation." (T. 13Nov07 at 52-53).

74. The IEP called for a placement at the resource level of the special education continuum. *Student* would spend between 40% and 79% of the school day with non-disabled peers. (Pet. Ex. 1).

75. On the *Prior Notice and Consent for Initial Placement for Special Education Services* that she signed at the September 20, 2006, IEP meeting, *Parent* made a handwritten notation above her consent to placement: "Disagree with placement at CMS, would agree if placement of services were @ (private school)." (Pet. Ex. 1). *Student*'s grandmother agreed that the services proposed in the IEP were fine, but she wanted them delivered at (private school).

76. On the *Prior Written Notice*, the IEP notes the matters discussed and decided upon as well as those rejected. In this case, that document states in part as follows: "The IEP team considered a more restrictive environment and rejected that option because current evaluations indicate that *Student* is performing at or above grade level and requires visually impaired services and orientation and mobility services to address his visual impairment for academic success. He will also receive APE [adaptive physical education] services. The IEP team considered the need for assistive technology and determined that at this time, his primary focus needs to be on the

acquisition [*sic*] of Braille skills. The team will revisit this consideration at the next IEP review. The IEP team considered *Parent*'s request that she be reimbursed for the cost of hiring a teacher of the visually impaired to serve *Student* at (private school) or to have CMS provide a VI teacher to provide services at (private school). The IEP team rejected that request because, based upon evaluations, an appropriate compliant IEP has been developed which will provide the appropriate level of services that *Student* requires at the EC program for the visually impaired at Elementary School E. *Parent* is not asking for tuition reimbursement at (private school), but for payment of VI services and/or CMS provided VI teacher. Requests from (private school) team members to provide "drive up" visually impaired services only at the EC program for the visually impaired at Elementary School E while *Student* remained enrolled at (private school) was also discussed and rejected. Based upon CMS' IDEA-Part B(611) Grant for the 2006/2007 school year, CMS does not provide visually impaired services to parentally placed students enrolled in private, parochial, or home school settings. The only service provided in these settings is speech therapy to students who have a primary disability in this area." (Pet. Ex. 1).

77. At the September 20, 2006 IEP meeting, the location for *Student*'s placement that was offered by CMS representatives was at Elementary School E in a resource room setting. (Pet. Ex. 1). Elementary School E is completely unfamiliar to *Student* and would require an hour and a half round trip commute. Additionally, Elementary School E was not *Student*'s home school. *Student*'s home school, B Elementary, was not offered as an option at the September 20, 2006 IEP meeting. No other options, such as "dual enrollment" were offered by CMS.

78. No CMS officials recommended any psychological evaluations. By the end of the meeting they were made aware that there were mental health concerns regarding *Student*.

79. At (private school), *Student* was placed in a regular education classroom with approximately 26 children. (Private school) provided *Student* with a one-on-one assistant in the room. (Private school) itself does not provide visually impaired services. It allowed the teacher hired by *Parent* to come into its school and to work with *Student* approximately two hours per day.

80. D.G. served as a counselor at (private school) but did not attend the September 20, 2006 IEP meeting and did not provide any written input for the team to consider. D.G. testified that she saw *Student* for counseling. She stated she started seeing him almost immediately when he returned to school. For several months he brought a friend when he came to see her. She stated that there were a lot of emotional issues he was dealing with and he wasn't talking to anyone but his friends. D.G. stated they got a great deal of information from those friends. At the time of the hearing, D.G. stated that *Student* had progressed and was much more open and willing to talk to herself, teachers, and after-school people as well as friends.

81. D.G. testified that at the first meeting she had with *Parent* that she (*Parent*) stated that "my primary concern is *Student*'s emotional well being." D.G. went on to testify that *Parent* stated, "I don't care if he fails third grade; I don't care if he doesn't meet the objectives for the third grade; he needs to heal." (T. 12Nov07 at 168). D.G. stated that *Parent* felt the only place *Student* could heal was at (private school) where he had friends he felt comfortable with and where he had an understanding of what the physical layout of the building was.

82. M.S. testified that, although her specific role is in adaptive physical education, she had the duty to work with the team to develop the entire IEP. She testified that the IEP was appropriate based on her evaluation and interactions with *Student* and her review of his records. "It addressed his need for developing Braille skills. It addressed his need for working on orientation and mobility. It addressed the fact that we did recognize he may or may not have some issues with strangers or whatever and gave him an opportunity to develop some additional coping skills in a variety of environments." (T. 16Nov07 at 46-47).

83. According to M.S., the IEP was designed to expire in four months so that the team could assess how *Student* would do as he entered a new educational environment and then come back to see what changes ought to be made.

84. H.C. testified that, based upon her work with *Student* and the information discussed at the September 20, 2006, IEP meeting, she had no concern about whether *Student* could make educational progress under that IEP. Although H.C. acknowledged that it was nice that he had certain visual memory maps, in her opinion, he needed to learn how to encounter new environments.

85. D.G., who was part of the IEP team, heard nothing during the meeting to cause her to have concern as to whether the level of services on the IEP would be appropriate. Having a memory map of (private school) was not a reason to leave him there, according to D.G.. In her opinion, he would have to go to many places where he did not have any memory map, and he needed to learn how to do that. She stated Elementary School E was a school with many resources, and great peer support among students facing similar issues. D.G. testified that she would have a part in the transition to Elementary School E. She testified that she would want *Student* to come to the building a day or two before he started classes so that they could walk through the building after classes were out.

86. The IEP presented at the September 20, 2006 meeting had one goal to address *Student*'s mental health needs, stating, "*Student* will increase self-advocacy skills to ask for adult assistance when he feels emotionally uncomfortable." (Pet. Ex. 1). Both *Parent* and Dr. D.S. felt that this goal was too simplistic. Dr. D.S. testified as an expert that "asking an adult is one of his hardest things because he doesn't trust adults. An adult almost murdered him, an adult murdered his sibling." (T. 13Nov07. at 33).

87. *Parent* stated that she always intended to have *Student* go to a CMS school. She demonstrated this intent by initiating contact with CMS two weeks after the shooting, by enrolling *Student* at B Elementary School, by fully and cooperatively participating in all requirements that CMS presented, and by ensuring the services she acquired at (private school) would only be temporary until he began attending CMS. *Parent* believed that *Student* would transition from (private school) to CMS after a period of dual enrollment in both.

88. At the September 20, 2006, IEP meeting, *Parent* rejected the services offered in the IEP. *Parent*, as well as the team members from (private school), expressed disagreement with the proposed placement. *Student* continued to attend (private school) for the entire 2006-07 school year. *Student* started the 2007-08 school year at (private school). At the hearing of this case, *Parent* stated that it was her plan to move with *Student* to South Carolina later in November 2007.

89. *Parent* paid $436.08 per month for tuition at (private school) for the 2007/08 school year. (Pet. Ex. 18). *Parent* contracted with Metrolina Association for the Blind for a TVI for *Student* from September 2006 through June 2007, incurring out-of-pocket expenses of $15,898.25. (Pet. Exs. 12 & 19).

90. *Parent* hired an interim TVI, M.K., for August and September 2007 for additional out-of-pocket expenses totaling $577.50. (Pet. Ex. 20). *Parent* hired C.S., a TVI Instruction for *Student*, from September through November, 2007 at a cost of approximately $1,050 per week. (Pet. Ex. 21).

91. *Parent* purchased a Romeo Braille Embosser for *Student*'s educational needs at an out-of-pocket expense of $3,205.72. (Pet. Ex. 24). *Parent* seeks reimbursement for the purchase of a BrailleNote Notetaker, software and training, totaling $4,695. (Pet. Ex. 23).

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.

2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahen Independent School Board,* 835 F.Supp. 340 (1993).

3. Petitioners have the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). The Petitioners have the burden of proof by a preponderance or a greater weight of the evidence regarding the issues enumerated above. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side.

4. *Student* is a child with a disability pursuant to N.C. Gen. Stat. § 115C-106.3 and is entitled to receive a free appropriate public education (FAPE) pursuant to the IDEA, 20 U.S.C. § 1412, 34 C.F.R. 300.121, and the North Carolina General Statutes and the North Carolina Procedures Governing Programs and Services for Children with Disabilities.

5. Respondent, Charlotte-Mecklenburg Schools (CMS) is the Local Educational Agency responsible for providing *Student* a free and appropriate public education in the least restrictive setting.

6. Congressional history and legislative intent as expressed in the findings and purposes of the IDEA reauthorization show that the intent of Congress was to tie the IDEA to the goals of the national disability policy. Several "messages" are explicit and implicit in the IDEA reauthorization as well as throughout the regulations. They include the premise that leadership by school officials is an important factor in assuring improved educational results for children with disabilities and that parents are indispensable partners in the education of their children. Incumbent in those messages is the basic premise that school officials must make decisions based on facts, objective data, research, and sound educational pedagogy. A focus on the child and compliance with the IDEA policies will maximize the likelihood that children with disabilities receive a quality education.

7. Respondent is required under federal and state law to make special education and related services available to *Student* and to offer him a free appropriate public education (FAPE) as that term is defined IDEA and state law. The IDEA defines a free appropriate public education as that which provides the disabled student with personalized instruction and sufficient support services to enable the student to benefit from the instruction. *Board of Education v. Rowley,* 485 U.S. 176, 102 S.Ct. 3034 (1982*); In re Conklin,* 946 F.2d 306 (4th Cir. 1991); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990).

8. *Student* is entitled to the preparation and implementation of an Individualized Education Program (IEP) as a consequence of being identified as a child with special needs. The IDEA requires an education plan likely to produce progress, not regression or trivial educational advancement. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). *Geis v. Board of Education of Parsippany-Troy Hills,* 774 F.2d 575 (3d Cir. 1985). The floor of educational benefit cannot be so low as to allow the child to squander his untapped potential for learning. "Trivial education advancement" is insufficient to satisfy the requirement for a FAPE. *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171 (3d Cir. 1998), *cert denied*, 488 U.S. 1030 (1989).

9. In *Rowley,* (cite above) the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. Quoting from the Court, "First has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." A determination that the District has failed either test is sufficient to support a determination that it did not provide an appropriate program. *Hacienda La Puente Sch. Dist. Of L.A. v. Honig,* 976 F.2d 487 (9th Cir. 1992).

10. Several factors are examined to determine whether an IEP provides FAPE. Consideration must be given to whether the program is individualized on the basis of the student's assessment and performance; whether the services are provided in a coordinated and collaborative manner; whether positive academic and non-academic benefits are demonstrated; and, whether the program is administrated in the least restrictive environment.

11. In determining the educational placement of a child with a disability, the Respondent must ensure that the placement is in the least restrictive environment (LRE). That is,

to the maximum extent appropriate, children with disabilities must be educated with children who are nondisabled. The placement decision must be based on the IEP after meaningful consideration of evaluation results, programming recommendations from Respondent, input from the Petitioner and consideration of the variety of options that may represent a continuum of deviations from the LRE. Expert opinion which may include recommendation for placement in (private school), must be considered, but not necessarily endorsed in making IEP and placement decisions for a child. *G.D. v. Westmoreland School District*, 930 F.2d 942 (First Circuit, 1991). The law leaves the matter about specific classroom location and specific teachers to the discretion of the school.

12. Though the statutory requirements of a FAPE do not apply to (private school) placements, parents will not be entitled to reimbursement for a (private school) placement unless it offers their child with a disability an education otherwise proper under IDEA. Petitioners maintain that (private school) met *Student*'s needs because he was familiar with the facility and faculty and he had friends there that provided him great comfort after the tragic shooting he was subjected to. Further, Petitioner maintained that he was receiving educational benefits.

13. Evidence of academic progress at a (private school) does not itself establish that the private place offers adequate and appropriate education for a child with a disability. Although nothing in case law indicates that a (private school) must be readily identified as a special education placement, a unilateral private placement cannot be regarded as proper under the Act when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient.

14. Information from the (private school) staff at the IEP meeting on the issue of *Student*'s emotional state was that he felt safe and comfortable at that school. No specific information as to how they believed the trauma that he had gone through was negatively impacting his educational performance was set forth. (Private school) did provide a one-on-one assistant but did not provide mobility or visual impairment services. They did allow Petitioner to bring in those individuals at her own expense. Thus CMS maintained that (private school) as an educational placement did not provide *Student* with any of the special education services he needed and that contention is supported by the evidence.

15. Although D.G., the (private school) counselor, testified that she saw *Student* for counseling, there is nothing in the record to reflect whether D.G.'s services differed in any way from services that could be offered to *Student* by any other elementary school counselor. Petitioner had the burden of proving that such services could not be accessed at a CMS school, which, by definition, constitutes a less restrictive placement than a (private school). Petitioner failed in the required burden of proof on this issue.

16. There was conflicting evidence in the testimony as to whether the term "post-traumatic stress disorder" was discussed at the meeting. *Parent* insisted that it was. The CMS staff who testified insisted that it was not. The *Prior Written Notice* from the meeting documents that information from a phone conversation with Dr. D.S. was considered but does not detail what the information was. Neither *Parent* nor her attorney asked for any written notation that post-traumatic stress disorder be noted as an issue in the documents generated at the September 20, 2006 IEP meeting. Further, neither *Parent* nor anyone on her behalf presented any written

documentation discussing *Student*'s mental health status or needs. Dr. D.S. testified that *Parent* did not ask her to prepare a written report for use by the IEP team.

17. Since an initial challenge decided by the US Supreme Court (*Board of Education v. Rowley*, 485 U.S. 176, 102 S.Ct. 3034 (1982), courts have ruled consistently that the IDEA guarantees a basic floor of opportunity for an education and that to provide FAPE an IEP must be reasonably calculated to provide meaningful educational benefit but not necessarily provide the best education possible.

18. Using the standards set forth above, the IEP and proposed placement were duly conceptualized to provide FAPE. The IEP was clearly individualized to meet *Student*'s needs as it was based on information from *Student*'s assessments and incorporated goals and objectives. Petitioners argue that *Student*'s IEP and proposed placement were substantially flawed because the placement was not the LRE, but that contention is not supported by the record. Testimony from CMS personnel indicated a willingness to work collaboratively on *Student*'s IEP (which was to last only four months) as well to a desire to refine the program as needed. That same testimony revealed CMS personnel had a rich experience in carrying out programs with other children who were blind or otherwise visually impaired. The evidence shows that *Student* would have an opportunity to participate with typically developing peers to the maximum extent possible. In fact, with one minor exception, Petitioner did not challenge the appropriateness of the goals and objectives of the IEP. Instead, as *Parent* indicated in her "consent" to receive services, she agreed with what was being offered, but she wanted it offered at (private school), at least at first, in a "dual enrollment" situation.

19. The IEP developed for *Student* and the recommended placement were appropriate to provide FAPE and thus, meet the standards outlined in IDEA beginning on September 20, 2006.

20. In placement outside the LEA, a parent runs a significant risk because, if it turns out that the child was offered a FAPE in a timely fashion, reimbursement will be denied. If the parents demonstrate that no FAPE was provided and the (private school) placement was proper under IDEA, reimbursement will be made. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 126 L.Ed. 2d 284, 114 S.Ct. 361 (1993). However, "equitable considerations are relevant in fashioning relief, and the court has "broad discretion" in the matter. *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 85 L. Ed. 2d. 385, 105 S. Ct. 1996 (1985). The Court must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter*, 510 U.S. at 16.

21. The CMS school term began August 25, 2006. On August 23, 2006, *Student* began at (private school). On September 20, almost 4 weeks after CMS classes began, the parties convened the IEP meeting. CMS staff recommended his placement at Elementary School E in a resource room setting. *Parent* continued to urge that *Student*'s placement be at (private school). *Student* in fact remained at (private school) the remainder of the school year and into the next year.

22. Contact with Charlotte-Mecklenburg Schools regarding *Student* was made on June 26, 2006, just 12 days after *Student* was blinded, when Grandmother (*Parent*'s mother)

contacted N.W., an Exceptional Children's Program Specialist with CMS. Petitioner cooperated fully with CMS, in moving toward services, beginning even while her child was still in the hospital. Delay for the development of an IEP must be attributed to Respondent.

23. *Student* was denied FAPE when he didn't have an IEP in place at the start of the school year that is *Student* was not offered FAPE in a timely fashion as required. *Parent* was justified in placing *Student* in a (private school) in August 2006 because he is entitled to be enrolled somewhere for the start of classes.

24. Respondent has argued that *Parent* was committed to sending *Student* to (private school). "Parents are taxpayers. Their children are entitled to a FAPE. They may honestly believe from the beginning that the best education the public system can give is not good enough, i.e. is not "appropriate" within the meaning of FAPE. The fact that the parents may hold this view cannot ipso facto amount to an automatic disqualification so long as they continue in good faith (e.g. no intentional delays, no obstructions) to participate in the development of an IEP and placement in the public school system." *J.K., a minor, by his parents and next friends, K. and L.K., et al v. Jerry D. Weast, Superintendent, Montogomery County Public Schools, et al,* 42 IDELR 58 (US District Court, Maryland 2004).

25. Like the Court in the above case, the Undersigned finds it would have been insensitive to force *Student* to withdraw from (private school) after attending for a month. Given the circumstances of *Student*'s disability (being blinded as a result of a shooting by his father) it would be difficult for him to suddenly move and be placed in new surroundings with unfamiliar persons. A reasonable transition time would have been and should have been the second semester of the school year.

26. The Undersigned exercising equitable discretion in the matter, and taking into account a multiplicity of factors as cited in the findings of fact finds that Petitioner, *Parent*, should be reimbursed for the services and equipment she paid for between August 23, 2006 and January 1, 2007. Petitioner does not seek tuition during that time period.

27. The IDEA does not require an LEA to pay for the cost of education, including special education and related services of a child with a disability at a (private school) if the agency made FAPE available to the child. However, "the public agency must include that child in the population whose needs are addressed consistent with §§ 300.131 through 300.144" of the IDEA regulations. 34 C.F.R. § 300.148

28. The IDEA requires that to the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under IDEA by providing for such children special education and related services in accordance with the amounts to be expended for the provision of those services (including direct services) by the local educational agency equal to a proportionate amount of Federal funds made available under IDEA. 20 U.S.C. Chapter 33 Section 1412

29. To meet the requirements of IDEA and of § 300.132(a) of the regulations, "each LEA must spend the amount that is the same proportion of the LEA's total subgrant under section 611(f) of the Act as the number of (private school) children with disabilities aged 3 through 21 who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3 through 21." 34 C.F.R. § 300.133.

30. The Undersigned takes official notice of the Charlotte-Mecklenburg Schools IDEA Part B (611) Grant, State Project Number 06-060-600, approved on 6 July 2006. Under paragraph F, Private School Participation/Parentally Placed, it is stated (as it is also stated in the 2007-08 Grant) that "children with disabilities in non-public schools in Mecklenburg County have a genuine opportunity for equitable participation in the CMS IDEA-Part B (611) project. No eligible (private school) child is denied services." This is consistent with Federal and State law and would provide *Student* with some individualized needed services consistent with the proportional amount due him as a child with a disability.

31. The CMS Grant goes on to state (as it is also stated in the 2007-08 Grant): "For the 2006-07 school year, CMS will provide services to (private school) students having speech as a primary disability. Students will be provided services by the speech language therapist at the public school closest to each student's (private school) or home within therapist caseload constraints. Site assignments for services will be completed by the EC central office." If this is the only direct service being provided to children in private placements, and the evidence indicates that it was, it is inconsistent with the IDEA and therefore inconsistent with CMS's own statement in the Grant that no eligible (since IDEA makes more than one category of disability eligible) (private school) child is denied services.

32. It is not suggested by the Undersigned that Respondent has engaged in any kind of "shady dealings," for the CMS Grant was properly submitted, signed and approved by the appropriate authorities. Nonetheless inconsistencies with Federal law are evident. First, the Child Find process in the Grant seems appropriate, however, it would be for naught to "find" and evaluate non speech impaired children within the LEA's jurisdiction and then offer them no services whatsoever in their private placement. Further, it is presumed when doing a "head count" for purposes of drawing down federal dollars that all children with disabilities within the CMS district are counted and not just those with speech language impairments. If that is the case, those non-speech impaired children under the IDEA should be receiving their proportional share of direct services for their individual needs. If CMS is only counting children with speech language impairments, the school system is missing out on "pulling down" Federal funds in order to serve the taxpayers of children with disabilities in private placements within the Charlotte area.

33. Understanding the authority given Respondent, but in following the language of the IDEA and regulations as the Undersigned must, the Undersigned concludes that even after FAPE was offered *Student*, as a child with a disability being educated in a (private school), he was entitled to educational services and related services as found appropriate on his individualized education program (IEP) in the amount using the federal proportional formulation applicable to children in private placement as set forth above and more specifically outlined in the IDEA and in the federal regulations.

34. The above is consistent with court cases finding that parents have a constitutionally protected right to decide where their child goes to school. See *Pierce v. Society of the Sisters of the Holly Names of Jesus and Mary,* 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), and, *Wisconsin v. Yoder*, 406 U.S. 205, 32 L. Ed. 2d. 15, 92 S. Ct. 1526 (1972) It is also consistent with the IDEA and court rulings finding that where the school district had determined that a child needed certain IDEA related services, the school district has an obligation under the IDEA to provide those services (in a proportional formula amount) without requiring the child to forgo his (private school) enrollment. *Veshi v. Northwestern Lehigh School District*, 772 A.2d. 469 (Pa. Cmwlth.) *appeal denied*, 567 Pa. 753, 788 A.2d. 382 (2001) The *Veshi* court noted that the IDEA was intended to provide children with disabilities both an appropriate education and a free education, and the IDEA should not be interpreted to defeat one or the other of the objectives. Veshi (citing *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 85 L. Ed. 2d. 385, 105 S. Ct. 1996 (1985))

35. The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law in accordance with N.C.G.S. § 115C-109.6 *et seq.* and N.C.G.S. § 150B-23 *et. seq.* There is also a Memorandum of Understanding between the North Carolina State Board of Education, through the Department of Public Instruction, Exceptional Children Division and the North Carolina Office of Administrative Hearings.

36. "The IDEA specifically provides for two approaches to administrative challenges. A parent is entitled to "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). If the state elects to allow the local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency. *Id.* § 1415(g)(1). If the due process hearing is held by the state, no appeal is required. The former system is often referred to as a two-tiered system, while the latter is known as a one-tiered system." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

37. "North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision is considered the official position of the state educational agency. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

38. A court must try to give meaning to all provisions of a statute and additionally to consider the intent of the legislature when creating the statute. *Wilkins v. North Carolina State University*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006). A court should not construe a statute in such a way that renders part of it meaningless. Id. at 380-81, 631 S.E.2d 224. Policy reasons for passing the statute as well as the history of the legislation are also helpful when interpreting. *Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294-95 (1991).

39. In accord with N.C.G.S. § 150B-34, the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision. Harmonizing the provisions of § 150B with § 115C so as "not rendering any part of them meaningless," and in light of the above cited case law, should a decision in special education matters be appealed to a state review officer (who renders the official position of the state education agency), then N.C.G.S. § 150B-36 shall apply. This is further consistent with Paragraph 8 of the Memorandum of Understanding which states: "The decision of the review officer is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. The review officer must also consider any further evidence presented to him or her in the review process."

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

The IEP developed for *Student* and the recommended placement were appropriate to provide FAPE and thus, meet the standards outlined in IDEA beginning on September 20, 2006. The Undersigned finds that Petitioners have failed in their burden of proof regarding substantial error by Respondent that would deny a FAPE to *Student* after September 20, 2006.

Student was however denied FAPE when he didn't have an IEP in place at the start of the school year on August 23, 2006. Petitioner, *Parent*, was justified in placing *Student* in a (private school) because *Student* was and is entitled to be enrolled somewhere for the start of classes. Equitable considerations are relevant in fashioning relief and are supported by the case law. As such, the Undersigned in considering all relevant factors holds it would have been insensitive and inappropriate to force *Student* to withdraw from (private school) after attending for a month. Given the circumstances of *Student*'s disability (being blinded by his father) it would be difficult and damaging for him to suddenly move and be placed in new surroundings with unfamiliar persons. The Undersigned exercising equitable discretion in the matter, and taking into account a multiplicity of factors as cited in the findings of fact holds that Petitioner, *Parent*, should be reimbursed for the services and equipment she paid for on behalf of *Student* between August 23, 2006 and January 1, 2007. Though case law supports payment of tuition for that period of time, Petitioner does not seek tuition during that time period.

Understanding the authority given Respondent, but in following the requirements of the IDEA and regulations, the Undersigned concludes that even after FAPE was offered, *Student*, as a child with a disability being educated in a (private school), was entitled to educational services and related services as found appropriate on his individualized education program (IEP) in an amount using the federal proportional formulation applicable to children in private placement from January 1, 2007 to June, 2007 and August, 2007 to November 2007, the time that *Student* moved from the State. After appropriate calculations, Petitioner should be and is entitled to be awarded that compensation.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with 20 U.S.C. § 1415(f) the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i).

In accordance with 20 U.S.C. § 1415(g) "if the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in the hearing may appeal such findings and decision to the State educational agency." The State educational agency shall conduct an impartial review of the findings and decision appealed. In accordance with 20 U.S.C. § 1415(h) "any party to a hearing conducted pursuant to subsection (f) . . . , or an appeal conducted pursuant to subsection (g) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children disabilities; (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and, (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions."

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

"North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision is considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

The decision of the review officer is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. In accordance with N.C. Gen. Stat. § 150B-36 the decision of the

Administrative Law Judge shall be adopted unless it is demonstrated that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The review officer must also consider any further evidence presented in the appeal process.

In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge's decision shall be adopted unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines, should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

This the 15th day of February, 2008.

Augustus B. Elkins II
Administrative Law Judge